

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE, DIVISION I
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

FILED
JUN 28 AM 10:07
DAVID C. [signature] CLERK

STATE OF TENNESSEE

)

evidentiary hearing requested DC

)

vs.

)

No. 2004-D-3113

)

PERRY AVRAM MARCH

)

**DEFENDANT'S MOTION TO DISMISS COUNTS TWO
AND THREE OF INDICTMENT AS TIME BARRED**

Comes now the Defendant Perry Avram March, by and through counsel, pursuant to Tennessee Code Annotated § 39-11-201(f) and Rule 12(b) of the Tennessee Rules of Criminal Procedure, and moves this Court to dismiss Counts 2 and 3 of the indictment as time barred. For cause the accused would show as follows:

- 1) The prosecution of this case was commenced, within the meaning of Tenn. Code Ann. § 40-2-104, with the finding of three-count indictment which was filed on December 8, 2004.
- 2) Count 2 of the indictment purports to charge the offense of abuse of a corpse in violation of Tenn. Code Ann. § 39-17-312. This count avers that:

PERRY AVRAM MARCH

on a day in **August, 1996**, in Davidson County, Tennessee and before the finding of this indictment, without legal privilege, knowingly disposed of a corpse in a manner known to be in violation of law, in violation of Tennessee Code Annotated §39-17-312, and against the peace and dignity of the State of Tennessee, and the statute of limitation was tolled because **Perry Avram March** was not usually and publicly a resident within this state since October, 1996.

[Boldface in original.]

- 3) Abuse of a corpse is a Class E felony. Tenn. Code Ann. § 39-17-312(b).
- 4) Tenn. Code Ann. § 40-2-101(b)(4) mandates that prosecution of a Class E felony shall begin within two (2) years.
- 5) Count 3 of the indictment purports to charge the offense of tampering with evidence in violation of Tenn. Code Ann. § 39-16-503. This count avers that:

PERRY AVRAM MARCH

on the ____ day of **September, 1996**, in Davidson County, Tennessee and before the finding of this indictment, knowing that an investigation or official proceeding was pending, or in progress, did intentionally or knowingly alter, destroy, or conceal any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding in violation of Tennessee Code Annotated §39-16-503, and against the peace and dignity of the State of Tennessee, and the statute of

limitation was tolled because **Perry Avram March** was not usually and publicly a resident within this state since October, 1996.

[Boldface in original.]

- 6) Tampering with evidence is a Class C felony. Tenn. Code Ann. § 39-16-503(b).
- 7) Tenn. Code Ann. § 40-2-101(b)(3) mandates that prosecution of a Class C felony shall begin within four (4) years.
- 8) The tolling statute on which the State purports to rely as to Counts 2 and 3 of the indictment is Tenn. Code Ann. § 40-2-103, which states:

40-2-103. Period of concealment of crime or absence from state. –

No period, during which the party charged conceals the fact of the crime, or during which the party charged was not usually and publicly resident within the state, is included in the period of limitation. [Code 1858, § 4988; Shan., § 6947; mod. Code 1932, § 11488; T.C.A. (orig. ed.), § 40-205.]

- 9) The Defendant is a citizen of the State of Illinois, having moved his residence from the State of Tennessee to the State of Illinois during September 1996.
- 10) During May 1999, the Defendant relocated from Illinois to the Mexican State of Jalisco.
- 11) During all times when the Defendant resided in Illinois, lawful extradition procedures remained available to procure the return of the Defendant to the State of Tennessee to stand trial for any crime(s) which the Defendant may have committed while present in the State of Tennessee.

- 12) During all times when the Defendant was physically present in Mexico, lawful extradition procedures remained available to procure the return of the Defendant to the State of Tennessee to stand trial for any crime(s) which the Defendant may have committed while present in the State of Tennessee.
- 13) The Defendant's absence from or non-residence in the State of Tennessee in no way impeded, obstructed or prevented the State from commencing prosecution of the Defendant within the applicable periods of limitation specified by Tenn. Code Ann. § 40-2-101(b).
- 14) Indeed, the State of Tennessee timely commenced, by the finding of an indictment filed during June 2000, a prosecution of the Defendant for theft within a few weeks after his move to Mexico. The instant indictment, which includes one count alleging commission of a Class A felony (which is not arguably time barred), was found while the Defendant was living in Mexico.
- 15) Tennessee's tolling provision applicable in civil cases wherein a defendant in a civil action is absent from the State of Tennessee, Tenn. Code Ann. § 28-1-111,¹ has been

¹This statute provides:

28-1-111. Suspension during absence from state – If at any time any cause of action shall accrue against any person who shall be out of this state, the action may be commenced within the time limited therefor, after such person shall have come into the state; and, after any cause of action shall have accrued, if the person against whom it has accrued shall be absent from or reside out of the state, the time of absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action. [Acts 1865, ch. 10, § 3; Shan., § 4455; Code 1932, § 8581; T.C.A. (orig. ed.),

authoritatively interpreted to be inapplicable where the remedy of the civil plaintiff is complete and unaffected by the absence of the defendant from the state. *See, e.g., Arrowood v. McMinn County*, 173 Tenn. 562, 565, 121 S.W.2d 566, 567 (1938) (“[W]hen the remedy of the suitor is complete and unaffected by the absence of the defendant, when his non-residence does not affect the right to sue, Code, Section 8581 (Act of 1865) providing that ‘the time of his absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action’ is without application.”).

- 16) The Defendant avers that the tolling language of Tenn. Code Ann. § 40-2-103 regarding a criminal defendant’s absence from the State should properly be interpreted in a manner similar to the tolling provisions of its civil litigation counterpart, Tenn. Code Ann. § 28-1-111. If this provision of § 40-2-103 is so construed, Tenn. Code Ann. § 40-2-101(b) bars prosecution of Counts 2 and 3 of the instant indictment.
- 17) The Defendant avers that, if its terms are applied literally, Tenn. Code Ann. § 40-2-103 unconstitutionally punishes or impinges upon the Defendant’s fundamental constitutional right to interstate travel. *See, State v. Sliger*, 846 S.W.2d 262, 264 (1993); *Shapiro v. Thompson*, 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328-1329, 22 L.Ed.2d 600

§ 28-112.]

(1969).

- 18) The Defendant avers that, in order to avoid constitutional infirmity, this Court must construe the provisions Tenn. Code Ann. § 40-2-103 related to an accused person's not being "usually and publicly resident within this state" as being inapplicable where the State's ability to prosecute is complete notwithstanding the accused's non-residence and is unaffected by the absence of the defendant from the state.

THE FOREGOING PREMISES CONSIDERED, the Defendant moves to dismiss Counts 2 and 3 of the indictment in this case as being barred by the statute of limitation. The Defendant requests an evidentiary hearing on this motion.

Respectfully submitted,

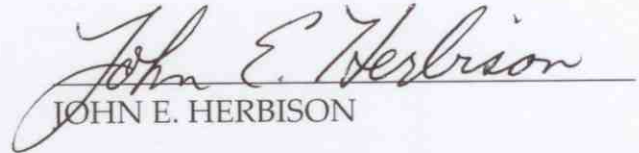

JOHN E. HERBISON # 12659
2016 Eighth Avenue South
Nashville, TN 37204
(615) 297-5900

WILLIAM D. MASSEY # 9568
LORNA S. McCLUSKY # 16803
3074 East Street
Memphis, Tennessee 38128
(901) 384-4004

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been transmitted by facsimile and hand-delivered to the Office of the District Attorney General, 222 Second Avenue North, Nashville, Tennessee 37201, this 28th day of June, 2006.


JOHN E. HERBISON